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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

SWITZERLAND CHEESE ASSOCIATION, INC., ET AL., PETITIONERS,

vs.

E. HORNE'S MARKET, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 17, 1965
CERTIORARI GRANTED JANUARY 31, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 831

SWITZERLAND CHEESE ASSOCIATION, INC., ET AL., PETITIONERS,

vs.

E. HORNE'S MARKET, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX TO BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6523

SWITZERLAND CHEESE ASSOCIATION, INC.,
SCHWEIZERISCHE KAESEUNION A.G., Appellants,

v.

E. HORNE'S MARKET INC., Appellee.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LIST OF RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings
1963	
Nov. 19	—Complaint filed. Summons issued.
1964	
Apr. 22	—Defendant's answer to complaint, filed.
May 14	—Plaintiffs' notice of taking depositions of President and Treasurer and Clerk of E. Horne's Market, Inc., on May 21, 1964 at 10:00 A. M., 79 Milk St., Boston, filed.
Sept. 1	—Request for Admissions Under Rule 36 of the Federal Rules of Civil Procedure, filed.
9	—Deft's response to request for admissions under Rule 36, filed.
Oct. 28	—Deposition of Melvin Green, filed.

[fol. 2]

1964

Dec. 23—Plaintiffs' motion for summary judgment and permanent injunction, filed with the following attachments: Plaintiffs' memorandum in support of the motion; Affidavit by Heinz Paul Hofer; Certificate by Dr. Fritz Bohnert; Affidavit by Harry B. Caplan and Affidavit by R. Frank Bennett.

1965

Jan. 27—Affidavit of Melvin Green in opposition to pltf's motion for summary judgment and permanent injunction, filed.

Feb. 1—Julian, J. Hearing on pltf's motion for summary judgment and for permanent injunction. Judgment of N. Y. Court, filed by pltf. Defendant to file an affidavit by Feb. 8, 1965 at 5:00 P. M. Advisement.

3—Second affidavit of Melvin Green in opposition to pltf's motion for summary judgment, filed.

15—Julian, J. Motion for summary judgment and permanent injunction denied, after hearing.

Mar. 3—Stenographic record of proceedings on Feb. 1, 1965, filed.

15—Pltf's notice of appeal filed. Cpy. to Harold E. Cole, Esq.

[fol. 3]

IN UNITED STATES DISTRICT COURT

Civil Action No. 63-956-J

COMPLAINT—Filed November 19, 1963

Switzerland Cheese Association, Inc. and Schweizerische Kaeseunion A.G., Plaintiffs herein, for their complaint against E. Horne's Market Inc. Defendant herein, allege:

I

This is an action for trademark infringement and unfair competition arising under the Trademark Laws of the United States. The jurisdiction of this court is founded on the provisions of Title 15 U. S. C. 1114(1), 1116, 1117, 1121, 1124 and 1125a. The acts of the Defendant which are hereinafter complained of have been and are being committed in the City of Boston, Massachusetts.

II

Plaintiff, Switzerland Cheese Association, Inc., is a corporation duly organized and existing under the laws of the State of New York and has a regular established place of business at 444 Madison Avenue, New York 22, New York.

III

Plaintiff, Schweizerische Kaeseunion A.G. is a corporation duly organized and existing by virtue of the laws of the Republic of Switzerland, and has a regular and established place of business in the city of Berne, in said State.

[fol. 4]

IV

Upon information and belief, the Defendant, E. Horne's Market Inc., is a corporation organized under the laws of the Commonwealth of Massachusetts and has a place of

business at 27-31 Faneuil Hall Market, Boston, Massachusetts.

V

On the following dates the following United States trademark registrations were duly and legally issued to Plaintiff, Switzerland Cheese Association, Inc. for its trademarks for use on cheese made in Switzerland, and as shown on the registration copies which are annexed hereto; and Plaintiff has been and still is the sole owner of said trademarks and trademark registrations.

Reg. No. 252,161	Jan. 29, 1929	Renewed 1/29/49
Reg. No. 266,078	Jan. 14, 1930	Renewed 1/14/50
Reg. No. 268,576	Mar. 18, 1930	Renewed 3/18/50
Reg. No. 303,388	May 23, 1933	Renewed 5/23/53
Reg. No. 745,911	Feb. 26, 1963	
Reg. No. 749,477	May 14, 1963	
Reg. No. 749,478	May 14, 1963	

VI

For many years there has been manufactured in the Republic of Switzerland a cheese made of cow's milk, fermented with rennet, which cheese has been produced in the form of large, round, flat loaves or wheels, with a hard crust and softer body, having a firm consistency, and being of a rich yellowish color, and distinguished by large holes created during the course of manufacture and cure, under the process developed in Switzerland.

[fol. 5]

VII

This Switzerland cheese has been generally and popularly known throughout the United States, for many years, as "Schweizer-Kase" and as "Swiss" cheese, and has for many years been imported into the United States solely from Switzerland.

VIII

By reason of the peculiar conditions existing in Switzerland, including particularly the water and the air, the "Swiss" cheese which is produced in that country is of a distinctive flavor, taste and quality, and has become well and favorably known as a high-grade product, among consumers of cheese in the United States, and elsewhere.

IX

Plaintiff Schweizerische Kaeseunion A.G., with the approval of the Government of Switzerland, has for many years past exercised and still now exercises complete control of the manufacture and sale in and the distribution from Switzerland of the aforementioned cheese product of that country. Plaintiff Switzerland Cheese Association, Inc. is a wholly owned subsidiary of Plaintiff Schweizerische Kaeseunion A.G. and is authorized to control the distribution in the United States of the cheese exported from Switzerland and which in this country has come to be known as "Swiss" cheese.

X

Plaintiff Switzerland Cheese Association, Inc. has heretofore maintained and is now maintaining continuous and active control and supervision of the marketing in the United States of the cheese exported to this country from Switzerland, under authorization from its parent company [fol. 6] Schweizerische Kaeseunion A.G. to control the distribution of the "Swiss" cheese. Plaintiff Switzerland Cheese Association, Inc. pursuant to its aforesaid authorization, has sole authority to license and does license the sale and distribution in interstate commerce of the cheese exported to the United States from Switzerland. Plaintiff Switzerland Cheese Association, Inc. further licenses the cutting up into slices and repacking in packages of "Swiss" cheese bearing one or more trademarks of Plaintiff Switzerland Cheese Association, Inc.

XI

Plaintiffs have for many years past selected and are now still selecting from the Switzerland manufacture for export to the United States only the cheeses which are of the highest quality, and which are suited to the particular taste of United States consumers. More particularly, in the exercise of their aforesaid control and supervision of the distribution and sale in the United States of the cheeses from Switzerland Plaintiffs have selected for marketing in the United States only those cheeses which meet the highest possible standards of quality, and which satisfy the consumer preference of the most discriminating United States purchasers, in respect to taste, color, texture, age, hole content, smell and otherwise.

XII

Plaintiffs, through great care and effort in their controlling and directing of the importing and distribution of the Switzerland cheese product, have maintained and enhanced the name and reputation in the United States of the "Swiss" cheese which has been imported from Switzerland as being of distinctive and superior quality and taste.

[fol. 7]

XIII

Plaintiffs have expended much time and money in maintaining and building up the good will associated with the aforesaid "Swiss" cheese, and Plaintiffs' imported cheese product continues to be highly prized in the United States, and to enjoy a preference in the market place in that United States consumers are willing to pay substantially more for the product of Switzerland which they know as "Swiss" cheese than for cheese of other manufacture.

XIV

Upon information and belief, after the aforesaid "Swiss" cheese had become favorably known and esteemed

and had come into demand by the buying public in the United States, a cheese was made in the United States and in other countries, including particularly Finland, Denmark and Austria, by a process imitative of that used in Switzerland for the manufacture of the Plaintiffs' "Swiss" cheese, which non-Switzerland made cheese was, on occasions, sold to the consuming public in the United States under the false representation that it was the "Swiss" cheese, at a price considerably cheaper than that of the true "Swiss" cheese, as actually manufactured in and exported to the United States from Switzerland.

XV

Upon information and belief, the cheese so manufactured in the United States and such other European countries outside of Switzerland, but under a process imitative of that employed in Switzerland, was likewise manufactured in loaves or wheels of the same kind, shape, thickness and appearance as the loaves or wheels in which the cheese produced in Switzerland had theretofore been manufactured.

[fol. 8]

XVI

Upon information and belief, both the genuine "Swiss" cheese as manufactured originally and only in Switzerland, and the aforesaid imitations thereof as subsequently produced elsewhere, were, for a time, sold without distinctive markings or designs, so that the consumers thereof in the United States became confused as to the place of origin of the cheese offered to them in retail stores, under the name and style of "Swiss" cheese, and frequently were misled into buying the imitation "Swiss" cheese, manufactured as aforesaid, in the belief that they were buying the cheese manufactured in and imported from Switzerland, which they actually intended to purchase.

XVII

Upon information and belief, various retailers, in order to enlighten the public, and to prevent them from purchasing such imitation and so-called "Swiss" cheese, under the misapprehension that they were purchasing the genuine "Swiss" cheese actually manufactured in Switzerland, have referred to and designated the cheese manufactured in and exported from Switzerland as "Genuine Swiss" and as "Imported Swiss" cheese, and also as "Genuine Imported Swiss Cheese," and have offered and sold cheese manufactured in the United States under a process imitative of the Swiss process as "Domestic Swiss" or "American Swiss", and the cheese similarly manufactured in other countries, as "Finnish Swiss" or "Danish Swiss"; and that, by such acts on the part of such vendors, the public has been, to some extent, apprised of the fact that so-called "Swiss Cheese" was being sold in the United States, which was manufactured in countries other than Switzerland, and was not of the same cost nor of the same quality as the cheese imported from Switzerland, as aforesaid, which latter cheese was preferred by persons familiar with the [fol. 9] taste and quality thereof, from previous experience and consumption thereof.

XVIII

Upon information and belief, the cheese made in the United States and other countries other than Switzerland, in imitation of the true "Swiss" cheese, has not acquired any reputation for quality or taste, but, on the contrary, was and is in fact and by reputation, inferior in quality, cost and value; and the fact that it was and is imported from such other country or countries is not a fact which would be an inducement to purchasers, or have advertising value in causing them to purchase the same.

XIX

Upon information and belief, Defendant has sold inferior cheese imitative of the genuine "Swiss" product, but which is imported from other countries than Switzerland, or is made domestically, and has not labelled its "Swiss" imitating cheese by country of non-Swiss origin, but rather has intended and contrived to mislead and deceive purchasers into believing that they were purchasing from Defendant the genuine "Swiss" cheese but at a price less than that asked by other retailers for the true "Swiss" cheese imported only from Switzerland.

XX

Upon information and belief, Defendant has in the past undertaken to, and is continuing now to, use on or in connection with its cheese goods, or containers therefor, or tags or labels or displays associated therewith, a false designation of origin and/or a false description or representation, including words tending falsely to describe or represent the same, in that Defendant has sold and/or is selling or advertising for sale as genuine "Swiss" cheese a product which is neither imported to this country from [fol. 10] Switzerland, nor of the quality approved by Plaintiffs for export to the United States, nor imported to the United States under the authority of Plaintiffs; and Defendant has with knowledge of the falsity of such designation of origin or description or representation caused or procured the same to be transported or used in commerce, or has delivered the same to a carrier to be so transported or used, all to the damage and detriment of Plaintiffs, and all in clear violation of Section 43 of the Trademark Law.

XXI

Upon information and belief Defendant has sold or offered for sale as imported "Swiss" cheese a cheese product which is not in fact the genuine cheese product manu-

factured in and exported to this country from Switzerland, but which is a product of a quality and taste demonstrably and greatly inferior to the true "Swiss" cheese; Defendant has thereby made false representations of origin calculated to deceive purchasers, and to cause irreparable harm and injury to Plaintiffs through destroying or damaging the reputation of Plaintiffs' "Swiss" cheese as cheese of unvarying superior condition, quality, and taste.

XXII

Upon information and belief, Defendant has sold or offered or advertised for sale cheese other than and greatly inferior to the genuine "Swiss" cheese, but under a name, style or designation which is a colorable imitation of one or more of plaintiff Switzerland Cheese Association's trademarks, or which so resembles one or more of Plaintiff's trademarks as to be likely to cause confusion or mistake or to deceive purchasers, or which is identified with Plaintiff's trademarks so as to cause or to be likely to [fol. 11] cause dilution or disparagement of the good will associated with Plaintiff's trademarks.

Wherefore, Plaintiffs Demand:

(a) That Defendant be preliminarily enjoined and restrained during the pendency of this action and permanently from the unlawful acts which are herein complained of.

(b) That Defendant E. Horne's Market Inc. be permanently enjoined and restrained from advertising, circularizing, selling or offering for sale any cheese, and using in connection therewith the words "genuine" or "genuine imported" in connection or juxtaposition with the words "Swiss" or "Switzerland", or any other variation or modification thereof similar to that used, advertised or hitherto employed by Defendant herein as may tend to

deceive purchasers, unless the product so offered by the Defendant is the product manufactured in Switzerland and imported to the United States by the Plaintiffs, or from using in connection with the words Swiss cheese the word "imported" where the cheese so offered is not in fact imported from Switzerland, unless the name of the country from which the same is actually imported is used in words or letters with equal prominence therewith.

(c) That Defendant be required to account to Plaintiffs for all profits gained by it and all damages sustained by Plaintiffs on account of Defendant's acts of trademark infringement and unfair competition as aforesaid.

(d) An assessment of costs of this action and reasonable attorneys' fees and judgment therefor against said Defendant.

[fol. 12] (e) That Plaintiffs have such other and further relief as to this Honorable Court may seem just and proper.

Dated: November 19, 1963

Switzerland Cheese Association, Inc., Schweizerische Kaeseunion A.G., By Robert A. Townsend, Blair and Buckles, 79 Milk Street, Boston 9, Massachusetts, Telephone: HUbbard 2-5161, Attorneys for Plaintiffs.

Of Counsel for Plaintiffs: John J. McGlew, Moses, McGlew and Toren, 28 West 44th Street, New York 36, New York.

[fol. 13] IN UNITED STATES DISTRICT COURT

TRADEMARK REGISTRATIONS ISSUED TO PLAINTIFF, SWITZERLAND CHEESE ASSOCIATION, INC., ANNEXED TO COMPLAINT

Registered Jan. 29, 1929. **Trade-Mark 252,161**

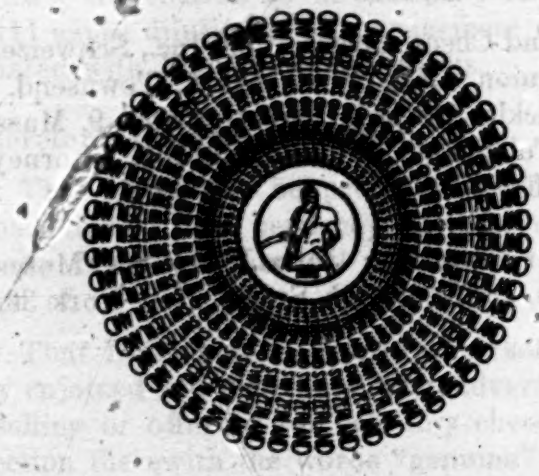
Renewed Jan. 29, 1949, to Switzerland Cheese Association, Inc., New York, N. Y.

UNITED STATES PATENT OFFICE.

FRED HAEBERLI, OF NEW YORK, N. Y.

ACT OF FEBRUARY 20, 1905.

Application filed April 19, 1928. Serial No. 265,103.



STATEMENT.

To all whom it may concern:

Be it known that I, Fred Haeberli, a citizen of Switzerland, residing in New York city, New York, located and doing business at No. 105 Hudson Street, in said city, has adopted and used the trade-mark shown in the accompanying drawing, no claim being made to the geographical word "Switzerland" and the descriptive word "Cheese", apart from the mark as shown.

This trade mark has been continuously used in my business since March 14th, 1928.

The merchandise to which this trade mark is appropriated is comprised in Class 46, Foods and ingredients of foods; and the particular description of goods in such class upon which the said trade mark is used is CHEESE MADE IN SWITZERLAND.

The trade mark is usually displayed by its printing same directly upon the goods, although it may be otherwise displayed as desired.

FRED HAEBERLI.

[fol. 14]

Registered Jan. 14, 1930 **Trade-Mark 266,078**

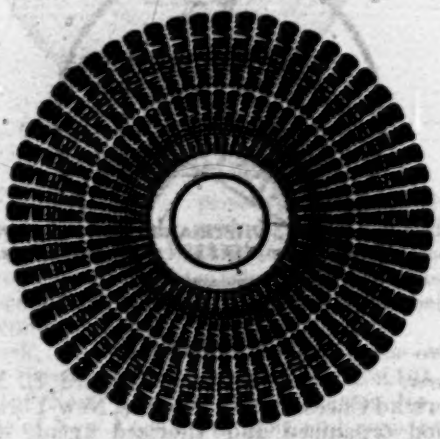
Renewed, January 14, 1950 to Switzerland Cheese Association, Inc., of New York, N. Y.

UNITED STATES PATENT OFFICE

SWITZERLAND CHEESE ASSOCIATION INC., OF NEW YORK, N. Y.

ACT OF FEBRUARY 20, 1905

Application filed August 1, 1929. Serial No. 297,502.



STATEMENT

To all whom it may concern:

Be it known that Switzerland Cheese Association Inc., a corporation organized and existing under the laws of the State of New York, located in the city of New York, county of New York, State of New York, and doing business at 105 Hudson Street, in the city of New York, county of New York and State of New York, aforesaid, has adopted and used the trade-mark shown in the accompanying drawing, for CHEESE MADE IN SWITZERLAND, in Class No. 46, Foods and ingredients of foods.

The trade-mark has been continuously used and applied to said goods in the business of said corporation since June 7, 1929.

Without relinquishing or forfeiting any of its common law trade mark rights and solely for the purpose of registration in the United States Patent Office, applicant disclaims the right to the exclusive use of the word Switzerland except in the general arrangement and style as shown in the drawing. The trade-mark is applied to the goods by being impressed directly thereon.

Applicant is the owner of trade mark registration No. 262,161 dated January 28, 1930.

SWITZERLAND CHEESE ASSOCIATION INC.,
By FRED EMMERICH,
Secretary and Treasurer.

Registered Mar. 18, 1930 **Trade-Mark 268,576**

Renewed Mar. 18, 1950, to Switzerland Cheese Association, Inc., New York, N. Y.

UNITED STATES PATENT OFFICE

SWITZERLAND CHEESE ASSOCIATION, INC., OF NEW YORK, N. Y.

ACT OF FEBRUARY 20, 1905

Application filed November 7, 1929. Serial No. 292,130.

STATEMENT

To all whom it may concern:

Be it known that Switzerland Cheese Association, Inc., a corporation organized and existing under the laws of the State of New York, located in the city of New York, county of New York, State of New York, and doing business at 105 Hudson Street, in the city of New York, county of New York, and State of New York, aforesaid, has adopted and used the trade-mark shown in the accompanying drawing, for CHEESE MADE IN SWITZERLAND, in Class No. 46, Foods and ingredients of foods.

The trade-mark has been continuously used and applied to said goods in the business of said corporation since June 7, 1929.

Applicant is the owner of trade-mark registration No. 252,161, dated January 29, 1929.

The trade-mark is applied to the goods by being impressed directly thereon.

The undersigned hereby appoints Richards & Geier, (a firm composed of Oscar A. Geier and Edward L. Mueller), of 274 Madison Avenue, New York, N. Y., and their duly authorized agent, its attorneys to prosecute this application, to make alterations and amendments therein, to enter opposition in its name against the registration of the same or in any similar trade-mark in favor of other applicants, to reply to any opposition which may be against the registration of this trade-mark, to transact all business in the Patent Office connected with this application and the certificate to be granted thereupon, to sign its name to the drawing and to receive the certificate of registration when issued.

The words "Switzerland Cheese," and the representation of a piece of cheese, are disclaimed apart from the mark as shown in the drawing.

SWITZERLAND CHEESE ASSOCIATION, INC.,
By FRED HAUSERLI,
Secretary and Treasurer.

Registered May 23, 1933 **Trade-Mark 303,388**

Renewed May 23, 1953, to Switzerland Cheese Association, Inc., of New York, N. Y., a corporation of New York.

UNITED STATES PATENT OFFICE

SWITZERLAND CHEESE ASSOCIATION INC., OF NEW YORK, N. Y.

ACT OF FEBRUARY 20, 1905

Application filed September 1, 1932. Serial No. 330,082.

STATEMENT

To all whom it may concern:

Be it known that Switzerland Cheese Association Inc., a corporation duly organized and existing under the laws of the State of New York, located in the borough of Manhattan, city of New York, county of New York and State of New York, and doing business at No. 105 Hudson Street, in the borough of Manhattan, city of New York, county of New York and State of New York, aforesaid, has adopted and used the trade-mark shown in the accompanying drawing, for CHEESE MADE IN SWITZERLAND, in Class No. 46, Foods and ingredients of foods.

The trade-mark consisting of the word "Switzerland", has been continuously used and applied to said goods in the business of said corporation since June 7, 1929, while the trade-mark in the present arrangement has been continuously used and applied to the goods in the business of said corporation since August 8, 1932.

Without relinquishing or forfeiting any of its common law trade-mark rights and solely for the purpose of registration in the United States Patent Office, applicant disclaims the right to the exclusive use of the word "Switzerland" except in the general arrangement and style as shown in the drawing. The expressions "Made in Switzerland" and "Switzerland Cheese", and the representation of the cheese are also disclaimed apart from the mark as shown. The trade-mark is applied to the goods by being impressed directly thereon.

Applicant is the owner of trade-mark registration No. 252,161 dated January 29, 1929, and registration No. 266,078 dated January 14, 1930, and registration No. 268,576, dated March 18, 1930.

The undersigned hereby appoints Oscar A. Geier of 274 Madison Avenue, New York, N. Y., and his duly authorized agent, its attorneys, to prosecute this application, to make alterations and amendments therein, to enter opposition in its name against the registration of the same or any similar trade-mark in favor of other applicants, to reply to any opposition which may be made against the registration of this trade-mark, to transact all business in the Patent Office connected with this application and the certificate to be granted thereupon, to sign its name to the drawing and to receive the certificate of registration when issued.

SWITZERLAND CHEESE ASSOCIATION INC.,
By FRED HAEBERLI,
Secretary and Treasurer.

16

[fol. 17]

United States Patent Office

745,911
Registered Feb. 26, 1963

PRINCIPAL REGISTER
Trademark

Ser. No. 113,869, filed Feb. 16, 1961

Switzerland Cheese Association, Inc. (New York corporation)
444 Madison Ave.
New York 22, N.Y.

For: CHEESE MADE IN SWITZERLAND, in CLASS 46.

First use Nov. 1, 1960; in commerce Nov. 1, 1960.

Without relinquishing or forfeiting any of its common law trademark rights and solely for the purpose of registration in the United States Patent Office, applicant disclaims the term "Switzerland" apart from the mark as shown.

Owner of Reg. Nos. 252,161, 303,388, and others.

[fol. 18]

United States Patent Office

749,477
Registered May 14, 1963

PRINCIPAL REGISTER
Trademark

Ser. No. 107,387, filed Oct. 28, 1960

Switzerland Cheese Association, Inc. (New York corporation)
444 Madison Ave.
New York 22, N.Y.

For: CHEESE MADE IN SWITZERLAND, in CLASS 46.

First use Sept. 1, 1960; in commerce Sept. 1, 1960.

Applicant disclaims the expression "Made in Switzerland" and the single word "Switzerland" apart from the mark as shown, and also disclaims the representation of the cheese apart from the mark as shown.

Owner of Reg. Nos. 252,161, 303,388 and others.

United States Patent Office

749,478

Registered May 14, 1963

PRINCIPAL REGISTER
Trademark

Ser. No. 107,801, filed Nov. 3, 1960

Switzerland Cheese Association, Inc. (New York corporation)
444 Madison Ave.
New York 22, N.Y.

For: CHEESE, in CLASS 46.

First use Sept. 1, 1960; in commerce Sept. 1, 1960.

Without relinquishing or forfeiting any of its common law trademark rights and solely for the purpose of registration in the United States Patent Office, applicant disclaims the term "Made in Switzerland" apart from the mark as shown.

Owner of Reg. Nos. 252,161, 303,388, and others.

[fol. 20]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER TO THE COMPLAINT—
Filed April 22, 1964

And the defendant answers the complaint as follows:

1. Defendant denies the allegations in paragraph no. I.

2. Defendant is without knowledge as to the allegations in paragraphs no. II and III, hence denies the same.

3. Defendant admits the allegations in paragraph IV.

4. Defendant admits that trademark registrations listed in paragraph V were issued by the Patent Office; but is without knowledge as to the owners thereof, hence denies the allegations in paragraph V except as to the aforesaid issuance of said registrations.

5. Defendant denies the allegations in paragraphs VI to XVIII inclusive.

6. Defendant denies the allegations in paragraph XIX.

7. Defendant denies the allegations in paragraph XX.

8. Defendant denies the allegations in paragraph XXI.

9. Defendant denies the allegations in paragraph XXII.

10. And as to any other allegations in said Complaint not expressly denied or admitted, defendant denies them.

E. Horne's Market Inc., Defendant, By Harold E. Cole, Attorney for Defendant, 101 Tremont St., Boston 8, Mass.

[fol. 21]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' REQUEST FOR ADMISSION OF FACTS 1, 2, 4, 5, 7, 8, 12 AND 13, AND DEFENDANT'S RESPONSE THERETO

Fact 1. Prior to the commencement of Civil Action No. 63-956-J, the Defendant sold in Boston, Massachusetts, Swiss cheese made in Finland and/or Austria under the designation "Imported Swiss Cheese".

Response: Admitted.

Fact 2. Prior to the commencement of Civil Action No. 63-956-J, the Defendant sold in Boston, Massachusetts, Swiss cheese made in Finland and/or Austria and displayed said Swiss cheese at Defendant's stalls in Faneuil Hall Market, Boston, by placing a sign or sticker on said Swiss cheese reading "Imported Swiss Cheese".

Response: Admitted.

• • • • • • •

Fact 4. The Swiss cheese made in Austria and sold by the Defendant does not bear any markings on the rind.

Response: Admitted.

Fact 5. The Defendant is in the habit of ordering imported Swiss cheese from its suppliers by specifying the country of origin of the Swiss cheese.

Response: Admitted.

• • • • • • •

Fact 7. Prior to the commencement of Civil Action No. 63-956-J, the Defendant sold in Boston, Massachusetts, Swiss cheese originating from Finland and/or Austria as "Imported Swiss Cheese" without specifying that said Swiss cheese originated in Finland and/or Austria.

Response: Admitted.

[fol. 22] Fact 8. Prior to the commencement of Civil Action No. 63-956-J, the Defendant sold in Boston, Massachusetts, Swiss cheese originating from Finland and/or Austria and displayed such Swiss cheese at Defendant's stalls in Faneuil Hall Market, Boston, by placing a sign or sticker on said Swiss cheese bearing the sole legend "Imported Swiss Cheese" and without indicating that said Swiss cheese originated from Finland or Austria.

Response: Admitted.

* * * * * * *

Fact 12. Switzerland Swiss Cheese is more expensive than Swiss cheese made in Austria.

Response: Admitted.

Fact 13. Switzerland Swiss Cheese is more expensive than Swiss cheese made in Finland.

Response: Admitted.

* * * * * * *

[fol. 23]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEPOSITION OF MELVIN GREEN—
June 17, 1964

Direct examination.

By Mr. Toren:

Q. Mr. Witness, for the record, will you please state your full name?

A. Melvin Green.

Q. And your address?

A. 110 Noanett Road, Needham Heights, Massachusetts.

* * * * * * *

Mr. Witness, what is your position in the defendant corporation?

A. Well, I am the treasurer of the corporation and I manage their business.

• • • • • • •

Q. And how long has the corporation been in business?

A. About five years.

Q. And you have been associated with the corporation from the beginning?

A. Right.

Q. And you have held the same position from the very beginning?

A. Right.

Q. Are you familiar with the business activities of the corporation?

A. Yes.

• • • • • • •

Q. Mr. Green, you mentioned that the products you are selling are meat products. Do you sell any dairy products?

A. Yes.

Q. What kind of dairy products do you sell?

A. We have a small line of cheeses.

Q. Any other dairy products?

A. Well, we sell butter. And oleomargarine, if that can be considered a dairy product.

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[fol. 24] Q. You mentioned previously that you are selling cheese products. Do you sell Swiss Cheese at the stall in the market?

A. Yes.

Q. Now, you also mentioned the number of suppliers for your cheese products. Do these suppliers also supply you with Swiss Cheese?

A. Yes.

Q. When you order Swiss Cheese from these suppliers, how do you order it? How do you indicate the nature of the product?

A. What do you mean by that?

Q. Do you write to them or telephone them and say I would like "X" pounds of Swiss Cheese, or do you identify the cheese more particularly?

A. Well, if I order cheese, I usually specify the type of cheese that I want, yes.

Q. Now, with regards to Swiss Cheese, how do you identify the Swiss Cheese?

A. Well, if I want domestic Swiss Cheese, I ask for domestic Swiss Cheese. If I wanted an imported Swiss Cheese, I ask for an imported Swiss Cheese.

Q. Is there a difference between domestic and imported Swiss Cheese?

A. Are you asking my opinion?

Q. Yes.

A. There is a difference in price, yes.

Q. Which one is more expensive?

A. Usually the imported Swiss Cheese is more expensive.

Q. Where does the imported Swiss Cheese come from?

A. I have purchased imported Swiss Cheese from Finland, I believe, and from Austria. That was originated in Finland and Austria.

Q. When you ordered this cheese from this supplier, do you tell him to send you Finnish, as you just said, or Austrian Swiss Cheese, or do you tell him to send you imported Swiss Cheese?

A. I either specify Finland or Austria.

Q. That is, you ask him for the name of the country where that cheese supposedly originates?

A. Yes, I believe I do that.

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[fol. 25] Q. When you receive this cheese from your supplier, what do you do with it?

A. Well, we normally store what we don't want to display in a refrigerated cooler, and we place several loaves of the cheese we do want to display on our display stand.

Q. Do you add any marking or identification to the cheese?

A. We had in the past put a sign on the cheese.
Q. What kind of sign?
A. A sign which said imported Swiss Cheese.

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Q. In your mind, is there a distinction between the Switzerland Swiss Cheese and the Austrian Swiss Cheese?
A. Absolutely, there is a distinction in price.
Q. Any other distinction?
A. In quality, my personal opinion, the Swiss Cheese that we have handled, that came from either Finland or Austria, was of equal quality. That is my personal opinion as far as flavor and taste, and consistency and appearance. I have been offered Switzerland Swiss Cheese from other brokers, but I felt that this other cheese which I am selling at a slightly lower cost is of better value to my customers.
Q. Did you say of higher cost?
A. This cheese which I am selling of slightly lower cost is of better value to my customers.

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[fol. 26]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION, AND ATTACHMENTS—
Filed December 23, 1964

Upon the affidavits and certificate annexed hereto, plaintiffs move the Court for summary judgment herein, granting a permanent injunction enjoining the defendant, E. Horne's Market Inc., its agents, servants, employees, and attorneys, and all persons in active concert and participation with them, from selling, offering for sale, advertising or promoting, either directly or indirectly, as "Imported Swiss Cheese", any Swiss-type cheese other than Swiss cheese made in Switzerland and selected and approved by plaintiffs for export to the United States, unless the name

of the country from which the cheese has been imported is used in words or letters of equal prominence therewith.

Plaintiffs further move for awarding damages and reasonable attorneys' fees.

Wolf, Greenfield & Hieken, Attorneys for the Plaintiffs, By: George L. Greenfield, A Member of the Firm.

Of Counsel for the Plaintiffs:

John J. McGlew, David Toren, Moses, McGlew and Toren, 28 West 44th Street, New York 36, New York.

[fol. 27]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT BY HEINZ PAUL HOFER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

Heinz Paul Hofer, being duly sworn, deposes and says on personal knowledge:

1. I am the president of Switzerland Cheese Association, Inc., one of the plaintiffs in this action.

2. I am fully familiar with the activities of plaintiff Switzerland Cheese Association, Inc. and plaintiff Schweizerische Kaeseunion A.G.

3. Plaintiff Schweizerische Kaeseunion A.G. is a Swiss enterprise which has been established by command and direction of the Federal Government of the Republic of Switzerland for the purpose *inter alia* of planning and controlling the production and supervising the marketing and exportation of Swiss cheese made in Switzerland. The establishment of plaintiff Schweizerische Kaeseunion A.G. has been ordered by the Swiss government in the form of several laws, the most recent being

"Beschluss der Bundesversammlung betreffend die Ergaenzung des Beschlusses der Bundesversammlung ueber Milch, Milchprodukte und Speisefette (vom 27. Juni 1957), IV. Kaesemarktordnung, Art. 12-14b. and

Bundesbeschluss ueber zusaetzliche wirtschaftliche und finanzielle Massnahmen auf dem Gebiete der Milchwirtschaft (Milchwirtschaftsbeschluss 1962) vom 4. Oktober 1962), Art. 1-16."

Resolution of the Federal Parliament concerning the supplementation of the resolution of the Federal Parliament in respect to milk, milk products and edible [fol. 28] fats (of June 27, 1957), IV Cheese Marketing Law, Articles 12 through 14b. and

Resolution of the Federal Government concerning additional economical and financial measures in the field of the milk industry (Milk Industry Resolution of 1962) (of October 4, 1962), Articles 1 through 16.

Article 12 of the first mentioned resolution reads in translation as follows:

"The Central Association of Swiss Milk Producers, the Association of Swiss Milk Purchasers and the Association of Swiss Cheese Exporters, as well as the firms of the cheese wholesale trade should take all suitable measures:

a. For advaneing the quality of the cheese;

b. To secure an orderly supply of the country with cheese and to maintain and to increase the marketing of the cheese both within and outside the country at prices which, if possible, assure the utilization of the cheese pursuant to the basic milk price as determined by the Federal Government (Art. 4).

c. To advance the production and the marketing of the specialties of the Alpine economy.

With a view to fulfilling the tasks which have been allotted by paragraph 1, hereinabove, the associations and firms referred to must create a suitable cheese marketing regulation and must create within this framework a joint organization for the cheese wholesale trade (in the following referred to as 'Joint Organization'; presently Schweizerische Kaeseunion A.G./Schweizerische Kaesekonvention) while observing the conditions which are set in the following articles. The associations referred to are hereby empowered to impose upon their sections corresponding obligations for the purpose of fulfilling these tasks."

[fol. 29] 4. In compliance with the Swiss law as referred to above, plaintiff Schweizerische Kaeseunion A.G. is owned by the Central Association of Swiss Milk Producers, the Association of Swiss Milk Purchasers, and all cheese exporters in Switzerland.

5. Plaintiff Schweizerische Kaeseunion A.G., in accordance with the authorization granted to it by the Swiss government, completely and fully controls and supervises the production and marketing of Swiss cheese made in Switzerland as well as the exportation of such cheese to the countries of the world including the United States.

6. Plaintiff Switzerland Cheese Association, Inc. is a wholly owned subsidiary of, and has been established in 1928 by, Plaintiff Schweizerische Kaeseunion A.G. for the purpose of controlling and supervising the importation and marketing of Switzerland Swiss cheese in the United States. Since 1928, Plaintiff Switzerland Cheese Association, Inc., in conjunction with the parent company, Schweizerische Kaeseunion A.G., has in fact effectively controlled and supervised the marketing of the cheese made in Switzerland and imported into the United States.

7. The cheese which is made in Switzerland, and has been made in Switzerland for many centuries, is well and favorably known throughout the world and has found con-

siderable market acceptance in the United States where such cheese has been sold for many decades. Like Swiss watches, Swiss made Swiss cheese identifies and symbolizes the skill and industry of the people of Switzerland.

8. The cheese which is imported from Switzerland is marketed in this country as "Switzerland Swiss Cheese", "Genuine Swiss Cheese" and "Imported Swiss Cheese".

[fol. 30] 9. Plaintiff Switzerland Cheese Association, Inc. has registered in the United States Patent Office numerous trademarks under Registrations Nos. 252,161; 266,078; 268,576; 303,388; 745,911; 749,477; and 749,478, each of which includes the word "Switzerland".

10. The designation "Imported Swiss Cheese" is a trade name and commercial name owned by the plaintiffs and used exclusively by the plaintiffs and their licensees in marketing the cheese made in Switzerland in the United States and other countries. According to the laws of Switzerland and the regulations and rules of plaintiff Schweizerische Kaeseunion A.G., the trade name "Imported Swiss Cheese" cannot be used without the authorization of plaintiffs.

11. Due to the strict control and supervision exercised by plaintiff Schweizerische Kaeseunion A.G., no Switzerland Swiss cheese reaches the market in Switzerland unless it is approved by plaintiff Schweizerische Kaeseunion A.G., and no Swiss cheese made in Switzerland is allowed to reach the United States market unless the cheese has previously been inspected and approved by plaintiffs.

12. Plaintiffs, through their great care and effort in controlling and directing the importation and distribution of the Switzerland cheese product, have maintained and enhanced the name and reputation in the United States of Swiss cheese and, due to the superiority of Switzerland Swiss cheese in regard to its quality and taste, Switzerland Swiss cheese enjoys preference in the market place in the United States as compared to Swiss type cheeses made in other countries.

13. The preference in the market place, as referred to in the preceding paragraph, is demonstrated by the fact [fol. 31] that the consuming public is willing to pay substantially more, and in fact does pay more, for the product of Switzerland, which they know as "Imported Swiss Cheese" or "Genuine Swiss Cheese" than for Swiss type cheese of other manufacture.

14. Switzerland is a party to the "International Convention for the Production of Industrial Property of 1833" with all its revisions.

Heinz Paul Hofer.

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF FRITZ BOHNERT, CONSUL

(Letterhead of)

CONSULATE GENERAL OF SWITZERLAND

NEW YORK

Ref.: 0.51.41 ... FB: FT

I, Fritz Bohnert, Consul, in charge of the Legal Department of the Consulate General of Switzerland in New York, and an attorney-at-law of Bern, Switzerland, herewith certify

That the Schweizerische Kaseunion AG. is a Swiss stock corporation created in order to comply with Article 12 of the Swiss Federal Decrees of September 29, 1953 and June 27, 1957.

That according to the aforesaid provision, the Schweizerische Kaseunion AG. had to be founded as a nation-wide organization for the Swiss cheese market with the legal obligation to fulfill the aims set forth in the above-[fol. 32] mentioned public law, among which are the furthering of the quality of the cheese, the assuring of a sufficient supply for the Swiss market and the maintaining and in-

creasing of the sale of Swiss cheese in Switzerland as well as abroad and this possibly at prices that assure the producers the processing of their milk at milk prices fixed by the Government.

That as Switzerland is a member of the Convention of Paris for the Protection of Industrial Property as revised at Lisbon according to the Federal Decree of December 7, 1961, published in the Official Gazette, 1963, page 121, and as the United States is also a member, the provisions of the said Convention apply to the operations of the said Schweizerische Kaseunion AG. dealings in the United States through the Switzerland Cheese Association, Inc., 444 Madison Avenue, New York, New York.

Fritz Bohnert, Consul.

New York, New York, December 17, 1964.

[fol. 33]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HARRY B. CAPLAN

I, Harry B. Caplan, being duly sworn, depose and say:

That I am the owner of Sam-O-Sons Markets, a corporation having a place of business at 250 Canal St., Lawrence, Mass.; and

That I have been associated with the marketing and sale of cheese, including Swiss-type cheese, for over 11 years and I am fully familiar with the trade practices in respect to the labeling and designation of such cheeses; and

That in all of my years in this business it has been the custom and practice to clearly differentiate between all of the types of Swiss cheese; and

That it has been the general practice of the trade to clearly designate all Swiss cheese which originates from Switzerland as being genuine or imported Swiss cheese; and

That cheese of a Swiss type which is manufactured either in the United States or countries other than Switzerland is always referred to by the country of origin; and

That Swiss-type cheese originating from Switzerland has always been of the highest quality and has been sold at a higher price than cheeses from other countries; and

That I have no connection with Switzerland Cheese Association, Inc. or Schweizerische Kaeseunion A.G. and have not been paid for furnishing this affidavit.

Harry B. Caplan.

[fol. 34]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. FRANK BENNETT

I, R. Frank Bennett, being duly sworn, depose and say:

1. I am General Manager of Radio Foods.

2. I have been associated with the merchandising of cheese, including Swiss-type cheese, since 1953 and I am well familiar with the trade practices which prevail in connection with the marketing and sale of Swiss-type cheese.

3. In addition to the genuine Switzerland Swiss cheese, imported from Switzerland under the supervision of the Switzerland Cheese Association, Inc., there are presently available Swiss-type cheeses in the United States which are manufactured in the United States or in some European countries such as Finland, Austria and Germany. The Swiss-type cheeses emanating from different countries have different quality and taste and the price of such cheeses is also different. The genuine Switzerland Swiss cheese is considerably higher priced than other Swiss-type cheeses and such genuine Switzerland Swiss cheese enjoys a consumer preference in spite of its higher price.

4. In order to avoid confusion of the public in respect to the different Swiss-type cheeses available on the mar-

ket, it is the established practice of cheese traders and retailers to indicate the country of origin of the particular Swiss-type cheese. Thus, for example, Swiss-type cheese made in Finland is always displayed as "Finnish Swiss cheese" or words of similar meaning.

A legend such as "Genuine Swiss Cheese" or "Imported Swiss Cheese" means Switzerland Swiss cheese to the trade and me but is not used by the trade without additionally and expressly indicating the country of origin of the cheese.

[fol. 35] 5. I have no connection with Switzerland Cheese Association, Inc. or Schweizerische Kaeseunion A.G. and have not been paid for furnishing this affidavit.

R. Frank Bennett.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MELVIN GREEN IN OPPOSITION TO PLAINTIFF'S (SIC) MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION—Filed January 27, 1965

Commonwealth of Massachusetts,
Suffolk County, ss.:

Melvin Green, a resident of Needham, Massachusetts, being duly sworn, deposes and says:

That he is the treasurer of the defendant corporation and manager of its business.

That the defendant operates a small retail meat and provision business, and also supplies restaurants. That altogether it has three full-time employees. That defendant sells between 15 and 20 lbs. of imported Swiss cheese weekly.

In the city of Boston insofar as I have observed, it is not the custom of retail dealers selling block cuts of imported Swiss cheese, such as defendant does, to designate it with the country of origin.

The imported Swiss cheese sold by defendant comes from Finland or Austria, and I have found that it is preferred to Swiss cheese from Switzerland, insofar as the defendant's customers are concerned. Choosing Swiss cheese is a matter of individual taste, and customers of defendant happen to prefer the cheese defendant carries from Finland or Austria.

The words "Imported Swiss Cheese" mean to the trade that the cheese is Swiss cheese coming from abroad, and said words are not trademarks or trade names; but are purely descriptive.

Melvin Green.

[fol. 36]

IN UNITED STATES DISTRICT COURT

JUDGMENT OF NEW YORK SUPREME COURT IN ACTION OF SCHWEIZERISCHE KAESEUNION BERN AGAINST SAUL STARK, INC., 162 MISC. 485, 293 N. Y. S. 816

At a Special Term, Part III, for Trials, Supreme Court, held in and for the County of Kings at Municipal Building, Brooklyn, New York, on the 2nd day of March, 1937.

Present: Honorable Meier Steinbrink, Justice.

File No. 7963—1936

SCHWEIZERISCHE KAESEUNION BERN, suing on its own behalf and on behalf of all other manufacturers of Switzerland Cheese, who may come in and join in this action, Complainant,

against

SAUL STARK, INC., doing business and trading under the name of "BEDROCK FOOD STORES", and MAX DINGOTT and JOSEPH LINCHITZ, Defendants.

The above entitled action having duly come on for trial in its regular course at a Special Term, Part III of this court on the 5th day of February, 1937, and the plaintiffs having appeared with their counsel, Samuel F. Frank, Esq., and the defendants Max Dingott and Joseph Linchitz having appeared by their attorney, Philip Zarch, Esq. and William Sparago of counsel, and the Court having thereupon granted the motion of the plaintiffs to discontinue this ac-
[fol. 37] tion against the defendant Saul Stark, Inc., and the proofs of the remaining parties having been duly submitted and the action tried, and the Court having thereafter on February 18, 1937, made and filed its decision awarding judgment to the plaintiff for the relief requested in the complaint, it is, upon motion of Frank, Weil & Strouse, Esqs., attorneys for the plaintiffs,

Adjudged, that the defendants, Max Dingott and Joseph Linchitz, their employees, agents, and servants, be and they hereby are perpetually enjoined and restrained from advertising, circularizing, selling, or offering for sale, any cheese, and using in connection therewith the words "Genuine," or "Genuine Imported," in connection with the words "Swiss" or "Switzerland," or any other variation or modification thereof similar to that used, advertised and hitherto employed by the defendants herein, as may tend to deceive purchasers, unless the product so offered by them is the product manufactured in Switzerland and exported to the United States by the plaintiff and other manufacturers in that country, or from using in connection with the words Swiss Cheese the word "Imported" unless the name of the country from which the same is actually imported be also used in words or letters of equal prominence therewith.

Enter,

Steinbrink, J. S. C.

Granted, March 2nd, 1937.
John N. Harman, Clerk.

[fol. 38]

IN UNITED STATES DISTRICT COURT

SECOND AFFIDAVIT OF MELVIN GREEN IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ETC.—
Filed February 3, 1965

Commonwealth of Massachusetts,
Suffolk County, ss.:

Melvin Green, a resident of Needham, Massachusetts, being duly sworn, deposes and says:

That he is the Melvin Green who executed an Affidavit dated January 27th, 1965 and on file in this case.

That he deposes as follows:

The words "Imported Swiss Cheese" mean to the trade that the cheese is Swiss cheese coming from the countries of Finland, Austria, Switzerland, or any other foreign country, and said words are not trademarks or trade names; but are purely descriptive.

In my Affidavit of January 27th, 1965 in stating that "The words 'Imported Swiss Cheese' mean to the trade that the cheese is Swiss cheese coming from abroad," I did not intend to limit the word "abroad" to a single country; but intend it to include all foreign countries from which Swiss cheese has come.

Melvin Green.

[fol. 39]

IN UNITED STATES DISTRICT COURT

EXCERPT FROM TRANSCRIPT OF HEARING OF MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

* * * * * * *

The Court: Why shouldn't summary judgment be entered in this case and a permanent injunction issued?

Mr. Cole: If your Honor please, the defendant has done what he has every right to do. He sold swiss cheese that is imported and he has called it imported swiss cheese.

The Court: Was it made in Switzerland?

Mr. Cole: It wasn't made in Switzerland, no.

The Court: Was it imported from Switzerland?

Mr. Cole: No. It didn't come from Switzerland.

The Court: Well, isn't it pretty well established that the words "imported swiss cheese" means cheese made in Switzerland?

Mr. Cole: No.

The Court: Do you have any case that holds otherwise?

Mr. Cole: There is no case that ever held that a man can't call it swiss cheese.

The Court: Doesn't the ordinary and reasonable person of ordinary intelligence who goes to a supermarket and sees cheeses on display know—you know how they have been displayed—as a matter of common knowledge, when he sees domestic swiss cheese, he knows that he is not getting anything from Switzerland because he is told. But then he says, the customer says: "What I want is genuine swiss cheese." And to my—

Mr. Cole: He doesn't say that.

The Court: To my knowledge the only way that has ever been identified on the market is by "imported swiss cheese." Now isn't it a little bit on the tricky side to go ahead and get what purports to be swiss-type cheese. If it had been imported swiss-type cheese, I could see your [fol. 40] argument; but it seems to me on the face of it that

this is an attempt on the part of the defendant to mislead and to invade the good will of the plaintiffs' product.

Mr. Cole: From time immemorial—

The Court: Give me one case where it was held that this is not—this is what you contend it is.

Mr. Cole: The only case you have was a lower court in New York case which said you can't call it genuine imported swiss cheese. But now we have a United States Supreme Court—

The Court: What is that again? What did you say?

Mr. Cole: In the New York case the court there held that—it was a lower court—that you can't call it genuine imported swiss cheese, and the original charge in this case was that we called it genuine imported swiss cheese, which we never did.

Mr. Toren: Your Honor, if I may interrupt. The judgment in the New York decision prevented or enjoined the use of the word "imported" alone. And my learned friend objected that I did not file a copy of the judgment. I don't think I have to but I have one.

Mr. Cole: Well, the point is what the court said in its opinion. Of course, I have no chance now to answer that. This is a lower court case and we recently have had a United States Supreme Court case.

The Court: What case is that?

Mr. Cole: It is a Sears Roebuck case. It is in my brief.

The Court: Just a moment. Where is it? You don't give me the citation. You give the Supreme Court Reporter but not the official citation in United States Reports. What is the official citation in United States Reports?

Mr. Cole: Well, I have the Supreme Court Reporter. It is 84 Supreme Court 784. It is only last year.

The Court: Do we have the Supreme Court Reporter available? Get 84. You give me all reports except the one that is officially used by the United States Supreme Court [fol. 41] and the courts generally. I think you should take the trouble when submitting a brief to the Court to make

sure that you have a citation, the form of citation which is generally used.

Mr. Cole: Well, I didn't know about that. I did give two citations. I think there are all together four law books.

The Court: Have you shown this judgment to counsel, brother counsel?

Mr. Toren: Yes, your Honor. I served a copy and I quoted it in my brief.

Mr. Cole: He just handed it to me now. However, if you read the court's opinion, you find it didn't say a word—

The Court: Just a moment. Don't anticipate. Did you read the part which enjoins the defendant from using in connection with the words "Swiss cheese" the word "imported" unless the name of the country from which the same is actually imported be also used in words or letters of equal prominence therewith"? Did you read that?

Mr. Cole: I have read that.

The Court: That is the case before me, isn't it?

Mr. Cole: Yes. But that isn't what the court said in its opinion.

The Court: The judgment is what counts, isn't it?

Mr. Cole: No. Furthermore,—

The Court: The judgment does not count?

Mr. Cole: Not unless the court in its opinion discussed it. That is my opinion. But another thing is they just handed this to me now. I have had no chance to check up to see whether that judgment was amended.

The Court: Was the judgment amended?

Mr. Toren: No, sir. No, your Honor.

Mr. Cole: Then why didn't the court in its opinion say so?

The Court: Of course, this is an old certificate, is it not?

Mr. Toren: Yes. The judgment was handed down in 1937. Now since that time the plaintiffs in this case have brought suit against a number of other persons who con- [fol. 42] sented to judgment on the basis of this New York State Court decision.

The Court: Well, isn't the defendant's point well taken, that there should be filed here a current certificate of it, with reference to this judgment; not one that is 28 years old?

Mr. Toren: I am not aware of any provision that I have to file a copy of the judgment at all. I relied on it in the brief.

The Court: But if you do—

Mr. Toren: I rely on the citation. I gave the citation in the brief.

The Court: But if you are relying on the judgment, don't you think then in that case you should file a certificate which is current?

Mr. Toren: Does your Honor mean I should obtain the current certificate from the New York Court? Because the judgment hasn't changed in these 27 years.

The Court: You represent that it has not?

Mr. Toren: No. It has not. It was handed down in 1937 but nothing has happened since then.

The Court: I will take your representation.

Mr. Toren: Thank you.

The Court: What is there about the Sears Roebuck case which sustains your position?

Mr. Cole: Well, the Sears Roebuck case, if your Honor will note, reversed a United States Court of Appeals on the subject of unfair competition and it said whatever is in the public domain cannot be taken from the defendant merely because it copied something that was not patented and was not copyrighted and, therefore, since the plaintiff had not been able to get a valid patent or a copyright, the defendant could copy it even though his lamp looked exactly like the plaintiff's. In other words—

The Court: That is, that lamp design?

[fol. 43] Mr. Cole: Yes, that lamp. But it reiterated the principle that in unfair competition you can't take away from the public what belongs to the public. Now the public in this case has a right to tell the truth. They have a right to call cheese Swiss cheese. If I understand your Honor,

you are stating the position that this plaintiff has some right in the words "Swiss cheese." If the cheese is imported, no, the Supreme Court is squarely against that. You don't take words in the dictionary having an ordinary meaning and then say: you can't use those.

In my opinion, your Honor, if you are inclined to grant this injunction, I hope you will write a full opinion so that if we take an appeal in the case, we will be able to get your views.

He comes into court here with an old 1937 judgment, nothing to prove that it is in effect. We don't know whether that case was really tried or not. All it says is—the usual things—says something about one defendant apparently dropped out. They discontinued one action. It didn't go to a high court at all. It only went to the Supreme Court. Apparently was tried. No appeal was taken.

The Court: Well, don't you think the Supreme Court of New York is a respectable Court?

Mr. Cole: It isn't a high court. The Court of Appeals for the Seventh Circuit is a respectable court and a good court, yet the United States Supreme Court unanimously reversed it last year.

The Court: Which case are you talking about?

Mr. Cole: I am talking about now the Sears Roebuck case.

The Court: I don't think I am going to be influenced very much by that in this connection.

* * * * * * *

The Court: Did you receive a copy of the motion for summary judgment and permanent injunction?

[fol. 44] Mr. Cole: Yes.

The Court: Did you receive a copy of the plaintiff's memorandum for the Court in support of plaintiff's motion? Did you receive that?

Mr. Cole: Yes.

The Court: The plaintiff states on page four, yes, page four, second full paragraph:

"It is the plaintiffs' position that the natural and inherent meaning of 'imported Swiss cheese' is Swiss cheese which has been made in and imported from Switzerland and that plaintiffs therefore, as a matter of law, are entitled to summary judgment and a permanent injunction enjoining the defendant from marketing cheese as 'imported Swiss cheese' where the cheese does not emanate from Switzerland."

Now is it your contention that imported Swiss cheese does not mean imported cheese from Switzerland?

Mr. Cole: My contention is that you can go in any store and buy Swiss cheese. If you want a cheese sandwich today, you can get it. Now if the cheese is imported, the dealer ought to say so. Now he can't always say the country it is imported from.

The Court: Why?

Mr. Cole: He may not even know where it is imported from. This is only a small dealer. He gets these pieces of cheese in blocks. He sells from 15 to 20 pounds a week. He doesn't get a great big cheese. If he got a great big cheese, then it is marked where it came from; but he gets a little cheese just to satisfy his customers. It is imported but he doesn't necessarily know where it is imported from.

The Court: Does it happen to be cheaper too?

• • • • • • •

[fol. 45] The Court: Do you have any evidence to show that when the words "imported Swiss cheese" are used on a Swiss-type cheese that it may mean cheese that is manufactured outside of Switzerland and imported?

Mr. Cole: Well, the affidavit of the defendant is to that affect (sic), but instead, your Honor—

The Court: Well, one question at a time. Where is your affidavit?

Mr. Cole: Well, I filed it. I suppose it is part of the case. Incidentally, your Honor—

The Court: Let's take one question at a time.

Mr. Cole: But you just said something, your Honor, and I would like to point out I think it is wrong. You are saying "Swiss-type cheese." That is not correct. If you go into a restaurant and order a Swiss cheese sandwich, you don't have to say "Swiss-type cheese."

The Court: I know that. But if I go to a restaurant and ask them for imported Swiss cheese, I expect—at least up until now I have expected to receive cheese that was made in and imported from Switzerland. This is the first time—and I eat in restaurants continually, and I happen to like Swiss cheese too, as a matter of fact, good Swiss cheese generally—this is the first case in the first instance that I have—and I may be wrong, of course, because I am only relatively young; perhaps I haven't been around restaurants enough, although I eat out practically every night—but it comes to me as a distinct surprise to be told that when I see the inscription, legend "imported Swiss cheese," that it is just to be understood that I may get Swiss cheese that is imported from a country other than Switzerland.

Mr. Cole: From different countries.

The Court: All I am saying is that it comes to me as a distinct surprise. Now you may be right. I don't know. I would be astonished if that is right because it seems to me a species of deception.

[fol. 46] Mr. Cole: Well, Swiss cheese comes from several different countries not just one, two or three. All we are saying is that we want to mark it imported not because this cheese from Switzerland is better. That isn't important. Because a small dealer oftentimes doesn't know what country it came from.

The Court: It can be very easily found out though.

Mr. Cole: How can he?

The Court: By getting a representation from his wholesaler.

Mr. Cole: He buys only a small slab.

The Court: He can still require the same representation.

Mr. Toren: Your Honor, if I may interject: there were depositions taken, and the defendant has admitted that when he orders his Swiss cheese, he specifies the country of origin.

The Court: Just a moment. Is this the affidavit of Melvin Green you referred to?

Mr. Cole: Yes.

The Court: Just a moment. I want to read it. Well, the question before me is whether or not there is any genuine dispute as to any material fact.

Mr. Cole: Oh, yes, there is.

The Court: I didn't ask you. The defendant has an affidavit here, the last paragraph of which states: "the words Imported Swiss Cheese mean to the trade that the cheese is Swiss cheese coming from" abroad * * * "and said words are not trade-marks or trade names but are purely descriptive."

Do you have any other evidence besides the say so of Mr. Green that the words "imported Swiss cheese" mean to the trade that the cheese is Swiss cheese coming from abroad, from a country other than Switzerland?

Mr. Cole: Let me say this—

[fol. 47] The Court: You omitted that. Instead of saying from abroad, from any country, it simply says coming from abroad. Of course, imported Swiss cheese that comes from Switzerland comes from abroad. I see an ambiguity in this affidavit.

Mr. Cole: No.

The Court: Please. You are in too much of a hurry to talk. I have given you many opportunities to talk and you keep interrupting me. This affidavit, this paragraph does not seem to be quite candid to me. It says "the words Imported Swiss Cheese mean to the trade that the cheese is Swiss cheese coming from abroad and said words are not trade-marks." Well, obviously, it comes from abroad if it comes from Switzerland too. It doesn't say Swiss cheese coming from abroad from all countries, Switzerland and other countries. It doesn't say that, does it?

Mr. Cole: Doesn't "abroad" mean—

The Court: I say, doesn't he say that?

Mr. Cole: No. If your Honor please, in connection with this I wish to point out another thing.

The Court: Well, I will give you five days within which to file an affidavit by this man, if he can file such an affidavit truthfully, that the meaning of the words "imported Swiss cheese" mean to the trade that the cheese is Swiss cheese coming from abroad from countries other than Switzerland as well as Switzerland itself. Is that what he intended to tell me by this affidavit?

Mr. Cole: Yes, he did.

The Court: He didn't say so. Have him explicitly say so.

Mr. Cole: I think "abroad" is so broad—

The Court: Don't argue with me. I want it put beyond doubt. I don't want any quibbling and I don't want any semantics in this case because if he is not telling the truth, then I want to know what it is that he is saying.

* * * * * * *

[fol. 48] The Court: The only question before me is whether or not there is any genuine dispute as to any material fact. If there is, I cannot grant the motion for summary judgment, as you know.

Mr. Toren: I know that, your Honor.

The Court: Now the question that appears to me will be raised here or the dispute that has been raised subject to further clarification by the affidavit that is expected to be filed is that in the trade—I assume that to be in the trade which deals with the sale of cheese on our markets, the buying and selling of cheeses—that the words "imported Swiss cheese" have come to have this accepted meaning, claims the defendant—whether it is true or not I don't know—namely, Swiss Cheese that has been imported into the United States from any country, whether it be Switzerland or any other country. That is the claim. Now when you say No, that is not true—I assume you say that—that

the words "imported Swiss cheese" have not acquired such a meaning in the trade—is that your contention?

Mr. Toren: Oh, yes.

The Court: So there is a dispute as to that fact, isn't there?

Mr. Toren: Well, your Honor—

The Court: There is a dispute and assuming that the dispute is genuine—and I have no reason to say that the dispute is not genuine because I am not familiar, nor could I take judicial notice because it isn't a question so commonly known and about which I could take judicial notice, that the contention of the defendant is not true—you have a dispute here, namely, as to what is meant in the trade when the words, "imported Swiss cheese" are used. Does it mean cheese that is manufactured in Switzerland and imported from Switzerland or does it have in the trade a wider meaning claimed by the defendant, namely, Swiss-type cheese that is imported from any country into [fol. 49] the United States not necessarily Switzerland. Now isn't that a genuine dispute?

Mr. Toren: Well, your Honor, I take the position that it is not because we have certain rules of language; and if I have a word like "Swiss" and I qualify it by "imported," then the natural, inherent, primary meaning means that the thing comes from Switzerland. That is simply a matter of language. That is number one.

The Court: The meaning of language, as you well know, depends also on usage.

Mr. Toren: Right. Now that is only one part of our claim.

The Court: What is the other part?

Mr. Toren: The other thing is that we rely on the International Convention to which both Switzerland and the United States are parties, and we have filed affidavits which have not been contested that we own the designation "imported Swiss cheese" and that under the Convention, as a matter of law, we are entitled to protection. That is

Section 44 of the Lanham Act which I have cited. Many cases have been cited under the Section.

Now the International Convention includes trade names and designations of origin, and the statute expressly embodies the International Convention. Section 44 of the Lanham Act embodies the International Convention.

Now again, as a matter of law, we feel we are entitled to protection both under the International Convention and the Lanham Act, Section 44, irrespective of any proofs the defendant may be able to adduce.

The Court: What do you say about that?

Mr. Cole: It is the same thing as before. The International Convention doesn't change our law at all. It is difficult, reading his memorandum, to know why he brings in the International Convention at all. If we have a right to call our cheese imported, then the International Con-
[fol. 50] vention hasn't taken it away. The thing I feel most strongly about is that you don't take the principle laid down in that Supreme Court case and apply it here.

The Court: I will read them again.

Mr. Cole: By the way, the Massachusetts Supreme Judicial Court has discussed this case within a few months. I just learned about that and unfortunately—

The Court: That is that copyright case, isn't it?

Mr. Cole: This isn't a copyright case.

The Court: I say, the case that you cited is a copyright case.

Mr. Cole: No. The Sears Roebuck case.

Mr. Toren: Your Honor, I am very well familiar with it. If I may briefly summarize it.

Mr. Cole: It is a lamp case.

The Court: The design of a lamp. It has to do with the design of a lamp.

Mr. Cole: And Sears Roebuck copied the lamp.

The Court: Right.

Mr. Cole: And what the Supreme Court is pointing out is that you cannot take things out of the public domain and give it to the one side or the other.

The Court: But this is not a copyright matter, is it?

Mr. Cole: Here is what they say it is. They say that the words "imported Swiss cheese" is a trade name. Now how do they prove it? Do you know, your Honor, they use two affidavits only to prove it?

The Court: Look: the only reason I called on you again was not to start argument all over again from its very beginning because I have given you ample opportunity to talk, but only to give you a chance to answer the second contention being made by the plaintiff, namely, the plaintiff's reliance on the International Convention and the Lanham Act. Now what do you say about that?

Mr. Cole: Well, I say that it is just the same situation if we use the words "imported Swiss cheese" and then that [fol. 51] is in general practice in the trade; then we are within our rights. We always come back to the dictionary. We can't help it, and I don't want to reargue that.

The Court: Don't reargue anything you have already argued.

* * * * * * *

The Court: * * * Do you wish to file any affidavit as to the trade usage?

Mr. Toren: Your Honor, if we do that, then, of course, we bring the case into the realm of fact. Now we brought that motion for summary judgment.

The Court: It is already in the realm of facts, isn't it?

Mr. Toren: Well, we feel it is a matter of law. We can prove all that we say. But for this we have to go to trial.

The Court: I don't think I have made myself clear. I have no choice in the matter. If there is a genuine dispute as to any material fact, I cannot, over the objection of the other party, grant the motion. The rule allows me to grant a motion for summary judgment only when there is no genuine dispute as to any material fact, even though it means an expensive trial.

Mr. Toren: Right, your Honor. Now the second point was the International Convention and the Lanham Act. It

hasn't even been mentioned in Mr. Cole's brief. Now that means he has not attacked it.

The Court: Apparently he takes the position that it is not conclusive. That is the position he takes from what he said.

Mr. Toren: But that is not a matter of genuine issue of fact if he simply says—

The Court: That is a matter of law.

Mr. Toren: That is a matter of law.

The Court: If what you claim is so.

Mr. Toren: Now that can be decided on summary judgment.

[fol. 52] The Court: Well, I will take the case under advisement and as soon as I have received the new affidavit, of which a copy is to be sent to counsel for the plaintiff, I will look into the motion and decide it.

* * * * * * * *

[fol. 53]

IN UNITED STATES DISTRICT COURT

ORDER APPEALED FROM

On February 15, 1965, the following action was taken by Julian, J. on Motion for Summary Judgment and Permanent Injunction:

"Motion denied after hearing."

Julian, J., By the Court, Eleanor F. Taylor, Deputy Clerk.

Feb. 16, 1965.

[fol. 54]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 15, 1965

(D-26)

Notice is hereby given that Switzerland Cheese Association, Inc. and Schweizerische Kaeseunion A.G., plaintiffs above-named, hereby appeal to the United States Court of Appeal for the First Circuit from the order denying plaintiffs' Motion for Summary Judgment and Permanent Injunction entered in this action on February 16, 1965.

Dated: March 15, 1965.

Wolf, Greenfield & Hieken, 165 Devonshire Street, Boston, Massachusetts, Attorneys for Appellants, By: George L. Greenfield, A Member of the Firm.

Of Counsel for Appellants: David Toren, John J. McGlew, George L. Greenfield, Moses, McGlew and Toren, 28 West 44th Street, New York 36, New York.

[fol. 55]

APPENDIX TO BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6523

SWITZERLAND CHEESE ASSOCIATION, INC.,
SCHWEIZERISCHE KAESEUNION A.G., Appellants,

v.

E. HORNE'S MARKET INC., Appellee.

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

AFFIDAVIT OF HAROLD E. COLE INCLUDING NEW YORK TIMES ISSUE SHOWING PLAINTIFFS' ADVERTISING THEREIN

Harold E. Cole, being duly sworn, deposes and says:

That he is attorney for defendant, and has a law office at 101 Tremont Street, Boston, Massachusetts, and resides at Taunton, Massachusetts.

That on Tuesday, October 6, 1964, he obtained the New York Times published as of that date. On page 60 of it there appeared an article on advertising and a picture with a reproduction of an advertisement of plaintiff's, a specimen of which is attached hereto and marked "Defendant's Exhibit A".

In this advertisement of plaintiff's there appears in fine print within the border of a rectangle, and in the last 3 lines (at the right) the following statement by plaintiff, The Switzerland Cheese Association, Inc.:

"Imported Swiss Cheese isn't good enough for you. Insist on genuine Swiss Switzerland Swiss Cheese."

This advertisement shows that the words "Imported Swiss Cheese" refer to all imported cheese and agrees with de-
[fol. 56] fendant's affidavit to that effect. It differentiates from imported Swiss cheese in general from its product by urging the public to insist on "genuine Switzerland Swiss Cheese".

Note the caution to the public: "I insist on Switzerland Swiss Cheese because . . . "

This advertisement gainsays the statements in the affidavits submitted with the Motion For Summary Judgment that "Imported Swiss Cheese" means Switzerland Swiss Cheese, for plaintiff itself draws the distinction and gives the identifying name to its product, namely "genuine Switzerland Swiss Cheese".

In connection with the words "Imported Swiss Cheese" it is pointed out that the affidavits of Caplan and of Bennett both referred to the practice of "the trade" in designating Swiss cheese (see Caplan affidavit, 4th paragraph) (3rd from bottom). Bennett refers to "cheese traders and retailers" in referring to this designation of imported Swiss cheese. See his affidavit, page 2, lines 1 and 2.

The statement in Plaintiff's Supplemental Memorandum filed after hearing on the motion for summary judgment that the meaning "to the trade" is not in issue is belied by its own affidavits aforesaid. The only consumer making a record on said motion is the statement of the Court referred to in said Supplemental Memoranda, Page 4, as follows:

> [fol. 57] "During the argument, the Court stated that it had always been the Court's understanding and belief that 'Imported Swiss Cheese' meant cheese from Switzerland and that in ordering an imported Swiss cheese in a restaurant, the customer should be entitled to expect a sandwich with cheese that had been imported from Switzerland."

While such understanding and belief on the part of this Court may be unusually persuasive to it, nevertheless it is not supported by established facts. Certainly the plaintiff would not be spending huge sums of money, as noted in the advertisement, Exhibit A, to persuade the public to differentiate between any foreign cheese which it calls "Imported Swiss Cheese" and its own cheese which it identifies as "genuine Switzerland Swiss Cheese."

Harold S. Cole

Commonwealth of Massachusetts,
County of Suffolk, ss.

Subscribed and sworn to before me this Feb. 15, 1965.

Ina F. Lundberg, Notary Public.
Harold S. Cole, Attorney for Defendant.

Note—A copy of the New York Times issue identified by [fol. 58] this affidavit is now somewhat faded, and it is not possible to clearly reproduce it. However, a copy will be presented tc this Court at the oral argument as well as a copy of the magazine in which the advertisement later appeared.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6523

SWITZERLAND CHEESE ASSOCIATION, INC.,
SCHWEIZERISCHE KAESEUNION A.G., Appellants,

v.

E. HORNE'S MARKET INC., Appellee.

MEMORANDUM RE SUBMISSION

On October 6, 1965, this cause was submitted to Honorable Bailey Aldrich, Chief Judge, and Oliver D. Hamlin, Jr., (by designation), Senior Circuit Judge and Honorable Edward M. McEntee, Circuit Judge.

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6523

SWITZERLAND CHEESE ASSOCIATION, INC., ET AL.,
Plaintiffs, Appellants,

v.

E. HORNE'S MARKET, INC., Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, Chief Judge, HAMLIN, Senior Circuit Judge,* and McENTEE, Circuit Judge.

David Toren, John J. McGlew, George L. Greenfield, Moses, McGlew and Toren, and Wolfe, Greenfield & Hieken on brief for appellants.

Harold E. Cole on brief for appellee.

OPINION OF THE COURT—October 19, 1965

ALDRICH, Chief Judge. This is an action for trademark infringement and unfair competition in which jurisdiction is posited upon the trademark laws, 15 U.S.C. §1051 et seq. The complaint sought a temporary and a permanent injunction and an accounting for damages. Prior to trial plaintiffs moved, on affidavits and counteraffidavits, for a summary judgment granting a permanent injunction. The district court, upon consideration, denied the motion. Plaintiffs appeal.

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* Sitting by designation.

[fol. 60] The first question is that of our jurisdiction. No determination was made, or sought for, warranting an interlocutory appeal under 28 U.S.C. §1292(b). Plaintiffs assert jurisdiction under section 1292(a)(1), permitting appeals from "interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions . . . " We do not find this section appropriate.

Plaintiffs concede that they did not ask for, and made no showing in the district court warranting, an interlocutory injunction, and that all they sought, and presently seek, is a permanent injunction. It is equally clear that the district court did not finally deny a permanent injunction, but merely held that in the present posture of the case there is an issue of fact making a summary judgment inappropriate.

It must be apparent that the denial of an interlocutory injunction is not the same as an interlocutory denial of a permanent injunction. By hypothesis the need, or alleged need, for an immediate appeal is urgent in the former case. Contrariwise, a final appeal from the interlocutory denial of a permanent injunction may never be needed; the court, when the evidence is taken, may grant, rather than deny, relief.

Because of the general policy against piecemeal appeals, statutes permitting interlocutory appeals are to be construed with some strictness. On this basis, whatever may be the exact letter, the spirit of section 1292(a)(1) is against plaintiff's position. In this we agree with cases such as *Morgenstern Chemical Co.* v. *Schering Corp.*, 3 Cir., 1950, 181 F.2d 160, and *Hook* v. *Hook & Ackerman, Inc.*, 3 Cir., 1954, 213 F.2d 122. See also *Division 689* v. *Capital Transit Co.*, D.C.Cir., 1955, 227 F.2d 19, and Clark, C.J., dissenting, in *United States* v. *New York, N.H. & H. RR.*, 2 Cir., 1960, 276 F.2d 525, at 549, 552, cert. den. 362 U.S. 961 and 964.

[fol. 61] Plaintiffs cite *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 2 Cir., 1960, 280 F.2d 800. It is true that in that case the court upheld plaintiff's position. We note, however, that the writer expressed his personal reluctance, but felt bound by the circuit's prior decisions. We are under no such disability. Furthermore, we think that the additional opportunity afforded by section 1292(b) for interlocutory appeals under controlled conditions enacted since the original decisions in the Second Circuit makes strict construction of the other sections all the more desirable.

Appeal dismissed for want of jurisdiction.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ORDER OF COURT—October 19, 1965

This cause came on to be heard upon appeal from the United States District Court for the District of Massachusetts, and was submitted on briefs by direction of the Court.

Upon consideration whereof, It is now here ordered as follows: The appeal herein is dismissed for want of jurisdiction.

By the Court: Roger A. Stinchfield, Clerk.

Enter: Aldrich, Ch.J.

[fol. 62] Thereafter, on October 26, 1965, mandate was stayed.

[fol. 63] Clerk's Certificate (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 831—October Term, 1965

SWITZERLAND CHEESE ASSOCIATION, INC., et al., Petitioners,

v.

E. HORNE'S MARKET, INC.

ORDER ALLOWING CERTIORARI—January 31, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.